MUNICIPAL CORPORATIONS—NON-LIABILITY FOR EXERCISE OF GOVERNMENTAL FUNCTION IN REFUSING BUILDING PERMIT.—X's application for a building permit in defendant city having been denied by its inspector of buildings, X brought mandamus proceedings against the officer and the city to compel the issuance of such permit, and prevailed. Defendants appealed, and, by agreement between the parties, a stay of all proceedings was entered; in this agreement it was stipulated that the filing of cost and supersedeas bonds was waived by X, "without waiving right to costs and damages to which he would be entitled if such bonds had been given." The order of the court below was affirmed on appeal, the permit was granted, and X erected the building. X now sues the city and its building inspector for damages for delay in the building operations. *Held,* that there could be no recovery. *Roerig* v. *Houghton,* (Minn., 1919) 175 N. W. 542.

It has been held that a municipal corporation is not liable for damages sustained by reason of a wrongful revocation of a building permit (*Lerch* v. *Duluth,* 88 Minn. 295), or of a license to exhibit a circus (*Kansas City* v. *Lemen,* 57 Fed. 905), but that the appropriate remedy is by injunction (*Stevens* v. *Muskegon,* 111 Mich. 72, *dictum*).The reason given is that the act complained of was within the scope of governmental functions, since the police regulations of a city are made and enforced in the interests of the public. *Claussen* v. *Luverne,* 103 Minn. 491. See the collection of cases in 18 L. R. A. (N.S.) 409 and in 34 L. R. A. (N.S.) 141. As to the liability of the inspector, the general rule is that a public officer cannot be held responsible in damages for the honest exercise of his judgment within his jurisdiction, however erroneous that judgment may be, provided he was acting judicially (*Randall* v. *Brigham,* 7 Wall. 523), or quasi-judicially (*Dillingham* v. *Snow,* 5 Mass. 547), but there is no exemption if he acts in a ministerial capacity (*McCord* v. *High,* 24 Ia. 336). The character of the act, rather than the character of the office, is the basis of the exemption. *Wall* v. *Trunbull,* 16 Mich. 228. In the instant case DIBELL, J., dissented on the ground that this was an action on contract, which the city could not escape.

PLEADING—PLEA IN ABATEMENT—CODE.—In conformity with Code Civ. Proc., N. Y., Sec. 498, which permits facts in abatement to be pleaded in the answer, together with defenses on the merits, it was *held* that the judgment of a federal court in that state for the plaintiff on a plea in abatement, which raised an issue of fact as to the jurisdiction of the court over the person of the defendant, should be that the defendant answer over. *Phil. & Reading Coal & Iron Co.* v. *Kever,* (C. C. A., 2d Circ., 1919) 260 Fed. 534.

For an excellent discussion of the incongruities and inconsistencies of present-day pleading in this matter of defenses in abatement and in bar, see *Sheppard* v. *Graves,* 14 How. 505, 509, 510. At common law where there was judgment for plaintiff on an issue of fact joined on a plea in abatement, the judgment was *quod recuperet, Brown* v. *Ill. Cent. Mut. Ins. Co.,* 42 Ill. 366; if on an issue of law, that the defendant answer over. The reason for this

difference was that courts looked upon dilatory pleas with ill favor, and held a plea in abatement raising an issue of fact to be an admission of the merits of the plaintiff's claim. GOULD'S PL. c. 2, s. 37; 1 CHITTY'S PL. 440. Under Code Procedure, the reason for this rule of judgment of *quod recuperet* has ceased to exist, in cases where defenses both in abatement and in bar are pleaded in the same answer. Under the code, as said in *Thompson* v. *Greenwood,* 28 Ind. 327, 332, "there is no authority for more than one answer, nor for more than one trial upon issues of fact. Every ground of defence must be stated in the same answer." It is technically possible for courts administering the code to adhere to the common law rule in cases where the answer in abatement happens to appear alone, *Thompson* v. *Greenwood,* 28 Ind. 327; *Bond* v. *Wagner,* 28 Ind. 462; but it is more logical to refuse to render a judgment on the merits upon a plea in abatement under any circumstances, and this would seem most nearly in harmony with the liberal spirit of the code.

PUBLIC OFFICERS—PAYMENT TO A DE FACTO OFFICER A DEFENSE TO SUIT FOR SALARY BY DE JURE OFFICER.—Plaintiff had regularly held position of city attorney since July 6, 1914. He contends that before his term of office was properly concluded, K was appointed to this office,—April 17, 1916, and the latter proceeded to perform the duties of the office, and was recognized as such, as well as paid the salary appertaining to this office. The plaintiff's action is for salary from April 17, 1916, to Aug. 1, 1916. *Held*: Payment to *de facto* officer of salary for time actually spent in performance of his duties is a complete defense to a suit for same by the *de jure* officer. *Wilkerson* v. *City of Albuquerque,* (N. Mex., 1919) 185 Pac. 547.

In the first place the court in the case at hand refuses to adjudicate the rightful title to this office in such an action as the present, to which K, the present holder of the office, is not a party. There seems to be adequate authority for this. MECHEM PUBLIC OFFICERS, § 330, *Walden* v. *Town of Headland,* 156 Ala. 562. Such title cannot be determined in an action by the former occupant for his salary. Thus, without deciding the *de jure* title, the court proceeds, apparently assuming K to be a *de facto* holder of the office. The payment of salary to K for the period in question was held to be a complete bar to any action for same by the plaintiff; further, that the plaintiff's remedy, if any, was to secure an adjudication of his title in a proper action, and then sue K for the amount received by him. The principle here laid down seems to be established law, in so far as salary actually paid to the *de facto* officer is concerned. See *Dolan* v. *Mayor,* 68 N. Y. 274; MECHEM, PUBLIC OFFICERS, § 332. This seems to be based on the right of the disbursing officer to rely on the apparent title of the *de facto* officer, (see case last cited), and on this alone. A rather anomalous situation is presented by such cases, for, by the weight of authority as well as reason, it seems that a *de facto* officer, though he has actually performed the services in question and though there be no other claimant, cannot successfully maintain an action for his salary.